PP

v.

AZMAN BAKAR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
IAN HC CHIN J
[CRIMINAL TRIAL NO: 45-01-2004]
11 AUGUST 2004

CRIMINAL LAW: *Murder - Motive - Jealousy - Whether proved beyond reasonable doubt - Whether evidence supported accused's assertion that he did not know victim - Whether accused cast a reasonable doubt on prosecution case*

CRIMINAL PROCEDURE: *Trial - Adjournment, applications for - Reasons for refusal - Tan Hun Wah v. PP*

The accused, a hotel waiter, was charged with the murder of an Assistant Minister of the Sabah state government, one Datuk Norjan Khan Bahadar ('Norjan') at a hotel room ('the room') in Kota Kinabalu. It was established that the accused was the last known person to have entered the room at a time when Norjan died and that he was found later with jewellery and handphone belonging to Norjan. The prosecution made out a *prima facie* case against the accused based on the evidence of one Amir, namely, that the motive for the murder was jealousy. The accused elected to give evidence on oath. The main issue was whether the accused knew Norjan sufficiently well enough to establish the motive of jealousy beyond reasonable doubt.

Held (discharging and acquitting the accused):

[1] In view of the accused's denial that he knew Norjan, this called for a consideration of whether the motive of jealousy was established beyond reasonable doubt. Jealousy in the sense used in this case meant that the accused must have known Norjan before the murder. However, the evidence on the whole supported the accused's assertion that he did not know Norjan until the morning he delivered the milk to the room. Infatuation leading to jealously could not have resulted from such a fleeting encounter between two persons who hitherto were unknown to each other. As for the testimony of the accused, the accused did not trip at all during the days when he was cross-examined (except for a small insignificant detail).

[2] The prosecution had gone at length to put forth the possible scenario as to what could have happened in the room and thereafter, all of which hinged upon the crucial factor of the accused knowing Norjan. However, there was only the evidence of Amir to support the prosecution case that the accused knew Norjan. In the face of the evidence of the accused and the rejection of the evidence of Amir as being not credit worthy, that evidence of Amir fell to pieces. So, too the motive.

[3] There was a reasonable doubt as to whether it was the accused who killed Norjan out of jealously. The explanation of the accused of there being another person present in the room added to the doubt of the case for the prosecution. It was difficult to disbelief the accused merely on the ground that he was a good actor as propositioned by the prosecution because the evidence of the prosecution had in some aspects lent support to his case.

[4] The applications for adjournments of this case were refused following the Supreme Court case of *Tan Hun Wah v. PP.*

Case(s) referred to:
Azman Jamhuri v. PP [2001] 1 CLJ 539 HC ***(refd)***
Mat v. PP [1963] MLJ 263 ***(refd)***
Miller v. Minister of Pensions [1974] 2 All ER 372 ***(refd)***
Mohamed Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohamed Yatin Abu Bakar v. PP [1950] 16 MLJ 57 ***(refd)***
PP v. Samin & Ors [1971] 2 MLJ 16 ***(refd)***
Tan Hun Wah v. PP [1994] 2 CLJ 180 SC ***(foll)***

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 23rd edn, p 1159

For the accused - Alexander HW Siew; M/s Alex Siew & Co
For the prosecution - Noorbahari Baharuddin (Amir Nasaruddin)

Reported by Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

Introduction

I have on 27 July 2004 called the accused, Azman bin Bakar @ Samsuddin bin Mustamin, to enter upon his defence to the charge of murdering Datuk Norjan Khan Bahadar ("Norjan") on 11 February 2004 at room 208 at Hotel Shangri-la, Bandaran Berjaya, Kota Kinabalu, between the hours of 4am and 6am. It will be recalled that there is uncontroverted evidence that Norjan had died in the said room, that the death was the result of a cut carotid artery inflicted by a kitchen utensil, that the accused was the last known person to have entered and left the room at a time when Norjan died and that the accused

was later found with jewellery and the handphone that belonged to Norjan. That in brief are the facts and circumstances which I find point irresistibly to the accused having committed the murder and I do not propose to set them out in detail here. As for motive, I was of the view that the accused was jealous after seeing Norjan with Amir. The accused elected to give evidence on oath. Before I advert to the evidence adduced on behalf of the defence, I will first remind myself the law that pertains to this stage of the case.

The Law

Two important principles of law must be borne in mind and they are (1) all that the accused needs to do to earn an acquittal is to cast a reasonable doubt in the case of the prosecution and (2) the prosecution carries the general burden throughout the case to prove the guilt of the accused beyond reasonable doubt (*Mohamed Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311). Where the accused's testimony is believed, then, of course, he is entitled to an acquittal (*Mat v. PP* [1963] MLJ 263). But even if the court does not believe his testimony, the court must still consider whether his evidence raises a reasonable doubt as to the truth of the prosecution evidence or the guilt of the accused (*Mohamed Yatin bin Abu Bakar v. PP* [1950] 16 MLJ 57). As to what is meant by "proof beyond reasonable doubt" Denning LJ in *Miller v. Minister of Pensions* [1974] 2 All ER 372, 373 said this:

> Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted to fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Finally, as to what that "doubt" is, Sharma J in *PP v. Samin & Ors* [1971] 2 MLJ 16 adopted the following definition:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

I turn now to consider the defence.

The Defence

The defence introduced evidence that throw new light in certain areas. One of which is that the maintenance staff, Christopher Crispen Lijawi, who went to fix the air-conditioner of room 208 saw only one woman in the room and it was the woman who opened the door for him and not Norjan. I have no valid reason not to accept the evidence of this impartial witness. Similarly, I have no reason to reject the evidence of David Phang that Norjan had not stayed in the hotel before 10 February; she did not stay there as far back as three years. The other area, leaving the rest to be dealt with when I consider whether any reasonable doubt had been raised in the case of the prosecution, concerned the accused and I need reproduce the summary of the evidence of the accused made by his learned counsel that I find to be accurate, *viz.*:

> 7.2 The accused's testimony can be summarized as follows: he saw a male in Room 208 when he delivered the hot milk. Datuk was standing close to him when she took out a RM10 bill to pay for the milk and he noticed that the wallet had a few compartments filled with cash. When he went back up to deliver a pot of hot water, the man opened the door, came out in a hurry, looking angry and collided with the tray, the water spilling. On his way back to the staff lift at the end of the corridor he saw the man again who was standing in front of the guest lifts. When he returned with another pot of water, Datuk asked him if he could massage her as she said she had gastric pains. The accused said he would return if there were no customers but first he had to return the tray first. He went back down and then after thinking over it, he went back to Room 208 and Datuk let him in. He proceeded to massage Datuk with "Minyak Cap Kapak" firstly on the stomach, then the back, then the thighs. As he had to get on the bed to massage Datuk, he took off his shoes. Datuk was wearing a nightgown and panties. While he was massaging the thighs, someone rang the door bell. Datuk asked him to open the door saying it was probably her assistant out there. He went to open the door without first putting back his shoes. When he opened the door, he saw the man he had seen earlier who asked him what was he doing in the room. Before he could reply the man walked into the room and saw Datuk on the bed with her thighs exposed and her panties visible. The man scolded him, asked him to get out which he did without taking his shoes which were left near the table where the "Minyak Cap Kapak" was. He then went to the staff toilet on the 4th floor to calm himself. He could not go back to the coffeehouse as he did not have his shoes. When he saw light coming through, he went back to Room 208 to try to get his shoes back. The door was slightly ajar and when he went in he found Datuk on the floor next to the bed with her face and upper body bloodied. He covered the bloodied part with a blanket. He then thought of the money and went to get the cash. He also took the jewellery of Datuk's left hand and some but not all the jewellery on the bathroom counter. He then smoked, thought about what to do next and then

> left the room, closing the door behind him. He went back to the toilet on the 4th floor to calm himself again and to try to hide the things he had taken with him. Thereafter he went back down to the coffeehouse using the staff staircase. He then served some customers, did his daily report and then punched out at 7.00 a.m. and headed back to the quarters with some of his colleagues.

The accused had also said he did not know Norjan before that night. So he asserted he did not kill her and that there was another man in the room. In view of the accused's denial that he knew Norjan, this calls for a consideration of whether the motive, which the prosecution said is jealousy, had really been established beyond reasonable doubt. Establishing motive in view of the evidence of the accused becomes crucial in order to tilt the scale against the accused. This was what was said by *Ratanlal & Dhirajlal's Law of Crimes*, 23rd edn., p. 1159:

> Ordinarily, when there is sufficient, direct and circumstantial, evidence connecting the accused with the commission of the offence the proof of motive become unimportant. But where the entire prosecution case rests on circumstantial evidence, motive undoubtedly plays an important part in such cases to tilt the scale against the accused, and if as in the instant case, the prosecution evidence has failed to prove sufficient motive for the murder of his newly wedded wife on the part of the accused-respondent, and the circumstances relied on by the prosecution appeared to be equivocal and not conclusive of his guilt, the acquittal of the respondent as ordered by the High Court must be upheld.

Jealousy in the sense used in this case meant that the accused must have known Norjan before 10 February. It will be recalled that for the *prima facie* case all that the prosecution had adduced with regards to this point, about the accused knowing Norjan, was that the accused, who was allegedly standing only five feet away and near the bar-counter, kept looking at Amir when Amir was seated beside Norjan. However, a receipt has now been produced to establish the fact that Amir was seated at table 60 and it was also established that table 60 was not 5 feet from the accused but right at the other end of the room and some six tables away. That was roughly (taking into account the space that tables and chairs occupied) about 30 to 40 feet away and that distance made it difficult if not impossible to discern in artificial light whether a person was looking at you or not. Then there is the evidence of the maintenance staff who said that only Baria was in the room while the bathroom door was locked which contradicted that of Amir and Baria who had said both of them as well as Norjan were in the room. So, it means Amir was in the bathroom with Norjan, leaving Baria in the bedroom to deal with the maintenance staff. Here again, both Amir and Baria lied. Given Amir's penchant to lie, like his denial

in having had sex with Norjan and of his being in the bedroom instead of the bathroom, he can no longer be considered credit worthy when to those lies is added this newly discovered untruth about the distance the accused was seated away from him when he alleged the accused kept looking at him. I certainly, after hearing the evidence for the defence, entertain a doubt as to whether the accused was really looking at Amir or looking in such a way as to show the accused was acquainted with Norjan. The prosecution had urged that because the accused had attended to the room service instead of the usual persons, this must mean the accused knew Norjan. But Eliza had said that she had asked Azman to take the hot milk to the room and it was not Azman who had asked for the task. Even if Azman did it could very well be because of the expectation tips. There are other matters that have been urged as supporting the inference that the accused knew Norjan, all of which I am of the view cannot be relied on. All of those propositions, which I will shortly set aside, cannot pass the vital test that whatever goes on between Norjan and someone and wherever Norjan went, day or night, would not escape the notice of either or both the two aides, Baria and Rosdah. The evidence led me to conclude that either of them would be close by wherever Norjan was. Given the insistence of Baria and Rosdah of not having seen the accused at anytime before this case, their evidence supported the accused assertion that he did not know Norjan until that morning when he delivered the milk. Infatuation leading to jealousy could not have resulted from such a fleeting encounter between two persons who hitherto were unknown to each other. The prosecution had contended that it was not possible for the accused not to have known Norjan as it is difficult to comprehend why Norjan, a Muslim woman and a public figure at that, would expose her body in a room in darkness to a total stranger. In her case, it is not at all difficult to comprehend. She had already planned a rendezvous and had sex with Amir. This tells us much about her and her proclivity for sex. Professing a certain religion and belonging to a certain race does not automatically clothe one with purity or with virtue (and that is true of any religion and of any race) nor with any less likelihood of erring. Far from it, even Providence recognised that all of us are predisposed to sin. So it should come as no surprise that Norjan did not mind a stranger massaging her. So, the matter of religion and race is neither here nor there. As for the accused being able to stand close to Norjan as to be able to see the money in the wallet and as showing the accused to know Norjan to be able to do that, this contention can easily be out to rest by finding the answer to this question – can you make or receive payment from someone by standing more than an arm's length away? Surely you cannot. That means the transacting parties have to be close to each other and definitely close enough to be able to see the contents of a wallet. This means that while Norjan was taking money out of the wallet, the accused was close enough to see the money inside. That closeness

should not mean that the accused knew Norjan. As for Baria and Rosdah being available for the massage, that does not call for any explanation from the accused as to why Norjan did not call them for the massage since the massage by the accused, I am of the view, did take place. Norjan had complained of stomach pain when she placed the order for the milk and that Rosdah and Baria did not receive any call from Norjan to complain of that, can only mean that Norjan did not want them to attend to her. If Norjan had known the accused she could have surely asked for the accused by name to bring the hot milk up but she did not, which could very well support the accused's allegation that he did not know her. After all, Norjan did not mind being seen with Amir in the coffee house in the wee hours of the day and I do not think Norjan would mind asking for the accused by name to bring her hot milk. Once, a doubt is raised, as has been done by the defence, as to whether the accused really knew Norjan, then the plank upon which the prosecution rested its case snaps and down goes the case for the prosecution.

The hypothesis put forth by the prosecution as to what really happened involving the accused, like his getting angry with Norjan after seeing her with Amir, then later on venting his anger on her, the opportunity for the accused to take the utensil from the kitchen and then returning it after cleaning the utensil to its holder all depended on there being evidence of the accused knowing Norjan. In this aspect of the case, I am inclined to believe that something had happened to Baria, Rosdah and Amir which made them reluctant to tell the truth. If the accused really knew Norjan, there is no way that this fact can escape Baria or Rosdah or both being almost in constant attendance to Norjan. As for the testimony of the accused, he did not trip at all during the days when he was cross-examined except for the small insignificant detail of whether he bought the cap in Tuaran or whether he brought it with him from Kota Kinabalu. The evidence of the prosecution in some important aspect supported the case of the accused, like traces of blood being found on the steps of a staircase which could possibly be the blood of the unknown person who had killed Norjan and a condom wrapper being found in the room which may support the case of another person having had sex with Norjan using a condom. Though it was argued that it could very well have been the accused who had used a condom but since it fitted both versions, the benefit of the doubt had to be given to the accused. It is the same situation with regard to the access to the kitchen to obtain and return the utensil as the layout of the place presented easy access to everyone. The prosecution had gone at length to put forth the possible scenario as to what could have happened in the room and thereafter, particularly as to how Norjan could have been stabbed while the accused was having sex with her, all of which hinged upon the crucial factor of the accused knowing Norjan. For the *prima facie* case, there is only the

evidence of Amir to support the prosecution case that the accused knew Norjan but in the face of the evidence of the accused and the rejection of the evidence of Amir as being not credit worthy, that evidence of Amir falls to pieces. So too, the motive. The motive for the murder is required since the prosecution case and that of the defence are delicately balanced and establishing the motive would have tilted the scale in favour of the prosecution. This is not to be so for the reasons I have stated.

Conclusion

This means that after a consideration of all the evidence in this case, a reasonable doubt lingers in my mind as to whether it was the accused who had killed Norjan out of jealousy. The explanation of the accused of there being another person present in the room added to the doubt of the case for the prosecution. It is difficult for me to disbelief him merely on the ground that he is a good actor as propositioned by the prosecution because the evidence of the prosecution had in some aspects, which I have mentioned earlier, lent support to his case. The accused is therefore discharged and acquitted. The exhibits are to be disposed off in accordance with the law and only after the disposal of the appeal and if there be no appeal after the time limited for the appeal.

Other Matters

In the course of the trial both learned senior federal counsel and defence counsel had in my chambers informed me that they have received disturbing telephone calls relating to this case but since they have made police reports of that I did not accede to the request to adjourn the hearing for a short while. The interference with this case did not stop and the son of the deceased attempted to influence the learned senior federal counsel in the matter of the evidence by making and circulating pamphlets outside the court. I would have pulled him up for the attempted interference if not for the fact that it would interrupt the on-going trial. Since the learned senior federal counsel had already referred the matter to the Federal Attorney-General by the time I became aware of it, I left it as it is.

I return to the matter of adjournment. There were other occasions where applications were made for adjournment by the learned senior federal counsel and which I did not accede. This is the opportune moment for me to explain why I conducted the trial in the manner I have done and why I have refused applications for lengthy adjournment. Put very simply, it is in obedience to a decision of the highest court of our land that is *Tan Hun Wah v. PP* [1994] 2 CLJ 180 where the Supreme Court said these:

In this case, the trial proper commenced on 24 January 1988. It was adjourned for continuation of hearing to 6 and 8 February, and again to 27 February. When the prosecution finally closed its case the next day on 28 February 1988, the trial was adjourned to a date to be fixed. It was finally fixed for continuation five months later to 27 July 1988. On that date the trial Judge called both the appellants to enter their defence. After giving their evidence on oath, the appellants closed their case the very next day on 28 July 1988. The trial was then adjourned three times for final submission by Counsels, and finally on 30 October 1988, both the appellants were found guilty and convicted. Thus, the whole trial was spread over a period of approximately nine months and six days, although from the events that had transpired the prosecution only required five days and the defence two days to complete their respective evidence from a total of ten witnesses inclusive of the two appellants.

Apart from the delay in the trial itself, it was not in dispute that the grounds of judgment of the learned trial Judge was supplied to the appellants, presumably through His Lordship's secretary only in February 1992, a further delay of about three years and three months from the filing of the notices of appeal in early November 1988. To acquaint ourselves with the facts leading to this long delay, we had taken it upon ourselves to examine the notes of evidence in great detail, and had discovered some startling facts. As can be seen from the numerous adjournments, the trial was chopped up and conducted on an instalment basis for a few days at a time extending over a period of more than nine months. Such a debilitating trial was certainly against the accepted practice and procedure of criminal trials in this country ever since the Registrar Circular No. 3 of 1960 was issued, which required that once a case commenced, it should be carried on from day to day until its conclusion, unless some unforseen circumstances occurred during the trial so as to make it absolutely essential for the Court to grant an adjournment. In the instant case no one could tell us why it was absolutely essential for the trial to be spread over almost the whole of 1988. We were of the view that after the first adjournment, fixing the case for continuation at a stretch for five or six days until its conclusion would have been more realistic even if it entailed in the postponement of other cases already on the hearing list. Further, if the various adjournments were unavoidable, they should be short ones so as not to lengthen the overall duration of the trial. It is certainly unacceptable to adjourn a partly heard criminal trial sine die or to a date to be fixed, because such a practice would inevitably result in inordinate delays in the administration of justice and affect the quality and reliability of the judgment of the Court in the evaluation of the evidence particularly in the demeanour of witnesses during cross-examination, and the special significance of certain primary evidence as the basis for making inferences. Written submissions are useful up to a point particularly on issues of law, but they invariably suffer

from the same weaknesses as a delayed grounds of judgment when dealing with issues of fact. Unless absolutely essential, the Court should insist on oral submission in criminal trials, when the evidence is still fresh in the minds of all concerned.

...

Where prejudice or unfairness had been sufficiently established, we agreed with and adopted the principle enunciated in the authorities cited before us on the effect of excessive delay not only in the supply of grounds of judgment but also delay in the trial itself. If the facts of the case so warrant, where there is a long delay in the supply of grounds of judgment, an appellate Court would readily accept the allegation of prejudice on the basis that there is every likelihood not only that the trial Judge's impression on demeanour of witnesses would be blurred, but also the delay would increase the chances of omission on the part of the trial Judge to deal with material facts and issues in the grounds of judgment, which ought to have been favourable to the appellants. Such danger would of course increase by manifolds, when, as in the present case, the trial itself was conducted by instalments over a long period. In this connection, it is relevant to refer to to the case of *Ling Ah Hun v. Public Prosecutor* (Perak Criminal Appeal No. 26 of 1960) referred to in [1960] 26 MLJ October xlv, where Rigby J said:

> But before I leave this case, I desire to draw attention to what I consider the quite intolerable delay in the proceedings before the learned President. The offence was committed on 6 January 1959, and both appellants were arrested that same day. Thereafter, there were a number of adjournments, primarily because, as it would appear from the record, the prosecution itself at that time was undecided as to whether the case should go for a preliminary enquiry or as to whether it should be dealt with summarily by the learned President. Finally, it was decided that the case should be summarily dealt with, and the trial commenced on 10 June 1959 - 5 months after the offence had been committed. It was then part heard, and did not continue until 16 July - again, some 6 weeks later. On 16 July the trial concluded and the learned President recorded a conviction. Quite properly, thereafter he adjourned the case in order to obtain a Probation Officer's report. Proceedings were again heard on 5 August, and sentence was passed on that day. Notice of appeal was at once given that same day, 5 August, and the appellants were released on bail pending the determination of the proceedings. On the notice of appeal being filed it was incumbent upon the learned President to provide his grounds of decision, and for the petition of appeal to be lodged within 10 days after the grounds of decision had been so provided. Those grounds of decision were not supplied until 26 February 1960. It apparently took the learned President 6 months

> and 21 days in which to prepare the grounds of decision in this relatively short and simple case. Delays of this nature are wholly intolerable and make an utter farce of the proper and expeditious administration of justice.

Successive Chief Justice had also issued directives against staggered and delayed trials and delayed judgment. So, it is important that the prosecution should avoid making applications that would result in events that the Supreme Court had warned against. Of course, the judge ultimately decides whether to grant adjournment or not and should bear the ultimate responsibility where trials are staggered and delayed. This takes me to the Sessions Court Judges and Magistrates in Sabah.

Even now, despite Kota Kinabalu having three Sessions Courts and four Magistrates Courts, there are only three prosecution officers to serve these seven courts. At any given time, only three criminal cases can proceed since one prosecution officer can attend to only one court while the criminal cases of the other four courts have to wait. It is this sharing by these seven courts of the three prosecution officers (and worse previously as there was lesser number of prosecuting officers) that had caused staggered trials. Surely, the obvious and simple solution lies in posting the full complement of seven prosecution officers to these courts and also of more prosecuting officers to Sandakan and Tawau which face similar shortage. This shortage had gone on for some years now and of course with it the back log of criminal cases. Not only does it cause back logs but a lot of part heard cases as well which more often than not had to be heard *de novo*, that is all over again. Quite a number of rape cases faced and are facing such problem all because of staggered trials and the officers being transferred away before the cases are completed. Sabah sees a very regular turnover of officers, in the sense that some are transferred here for a couple of months before being transferred away, always leaving part-heard cases. The number of cases that have to be reheard over the years are quite large and it is a tremendous waste of time and it is sad that this had gone on despite what the Supreme Court had said, *supra*, because if the trials had not been staggered you would not get such large number of cases that required rehearing by the officers who took over the post. The people who suffered most are the rape victims because they have to come to court again and again to relive their horrible experience on account of the cases having to be heard *de novo*; in one recent case for the third time because the previous hearings were aborted on account of the successive transferring away of the officers who heard that case. The solution to this problem lies in not promoting or transferring away officers who still have lots of unfinished business.

As for the Sessions Court Judges and Magistrates in Sabah and Labuan, I would urge you to hearken to what the Supreme Court had said, *supra*, as you may not be as lucky as the officer who despite my criticism of him in *Azman Jamhuri v. PP* [2001] 1 CLJ 539 and who despite his tardiness which I set out in that case was promoted to become a chairman of the Industrial Court. Then again, maybe not so lucky, if we are to go by the newspaper reports, because he faced the ignominy of being sacked from that post publicly through the newspaper very recently.

To conclude, it is my hope that the prosecution in Sabah would not conduct their cases on an instalment basis, that the authority would not post judicial officers to Sabah for short period of time, like three or four months and that the authority concerned would post enough prosecution officers to Sabah. The accused is free to go. It is up to the authority whether or not to deal with him concerning his identity papers, the theft of the money and jewellery and his failure to report to a police officer of the discovery of a dead body.